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No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

KENNETH L. KENLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

WHETHER AN ATTORNEY CAN BE FOUND TO HAVE RENDERED CONSTITUTIONALLY DEFICIENT ASSISTANCE TO A CRIMINAL DEFENDANT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION WHERE (1) COUNSEL MADE A REASONABLE INVESTIGATION OF RESPONDENT'S SOCIAL HISTORY AND MADE A REASONABLE DECISION TO INVESTIGATE NO FURTHER AND (2) INFORMATION ABOUT RESPONDENT'S SOCIAL HISTORY IS SO INSUBSTANTIAL THAT THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PENALTY PHASE WOULD HAVE BEEN DIFFERENT HAD THIS INFORMATION BEEN PRESENTED.

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OPINIONS BELOW

The panel Opinion of the United States Court of Appeals ordering the vacation of respondent's death sentence is reported at 937 F.2d 1298 (8th Cir. 1991) (A-1). The Judgment and Order of the district court is not reported, but is included in the Appendix (A-51).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on May 17, 1991 (A-1). The Petition for Rehearing or Rehearing En Banc was denied by the court on August 13, 1991 (A-204). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present Petition for a Writ of Certiorari was required to be filed by petitioner[1] within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

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[1]Petitioner Paul Delo is respondent's current custodian following respondent's transfer from the Missouri State Penitentiary to the Potosi Correctional Center. Under 28 U.S.C. §2254, Rule 2(a), Fed.R.App.P. 23 and Supreme Court Rule 35.3, Paul Delo is the proper petitioner before this Court. Supreme Court Rule 14.1(b).

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted of capital murder, § 565.001, RSMo 1978 (repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of Butler County, Missouri. The circumstances surrounding respondent's crime were

summarized by the Missouri Supreme Court on direct appeal.

> On January 1, 1984, Defendant came to the home where he was residing with a large number of handguns. He kept one of these, a silver .38 caliber pistol. The next day he purchased some .38 hollow point ammunition and with a friend practiced with the pistol by shooting at cans and trees. On January 3 at approximately 11:00 p.m. Defendant borrowed a brown Ford station wagon from his host and drove to the Kater Inn Package Store in Poplar Bluff. He entered the store with his pistol and threatened to kill the salesman unless the cash register money was given to him. The money was given to him. While this was transpiring a female customer, Sandra Buttry, entered the store and was ordered to lie on the floor. Upon completion of the robbery, Defendant grabbed Ms. Buttry's arm and forced her to leave with him. Once outside he pointed his pistol at Ms. Buttry's male companion, forced Ms. Buttry into the Ford station wagon and drove away. Upon Ms. Buttry's inquiry as to why he had taken her, Defendant stated he was "going to get a piece of ass." He then ordered Mrs. Buttry to perform fellatio on him. She opened the car door and jumped out of the car but was shot in the back by Defendant as she exited the car. As she was receiving assistance by a passing motorist Defendant drove back to where she was and then proceeded to the South. Ms. Buttry's wound was not fatal.

Approximately half an hour later Defendant entered the Blue Moon Tavern in Poplar Bluff and announced to the eight persons inside, "This is a holdup. Everyone hit the floor." When the people in the tavern did not immediately respond, Defendant stated, "I said this is a holdup. Hit the floor. I mean business and I'll make an example out of you." He then aimed his pistol at Ronald Felts, one of four people standing near a pool table, and from a distance of approximately 10 feet shot Felts through the temple. Felts died virtually instantaneously. With the occupants on the floor Defendant ordered the tavern owner, Ms. White, to open the cash register. He then proceeded to the back of the bar to collect the money and while there fired a shot over the heads of Ms. White and the bartender, Randy Jenkins. After collecting the money he ordered White and Jenkins to leave with him, but when they reached the end of the bar Defendant ordered Jenkins to the floor and shot him in the jaw. Jenkins recovered from the wound. Defendant then stated to White, "Bitch, you're going with me. You're going to give me head." In attempting to leave Defendant got the Ford station wagon stuck on the curb, so he and Ms. White returned to the tavern to get her keys. There he threatened to kill a fifteen year old girl if she had called the police, stating that he had already killed once and would do it again. Defendant and Ms. White then entered her vehicle. Defendant fired a shot at a bystander and the automobile left with Ms. White driving. Through a ruse she

> managed to open the car door, jumped out and ran back toward the tavern. Defendant got control of the car and drove on.
>
> In less than half an hour Defendant entered the Coachlight Motel in Poplar Bluff and after robbing the proprietor at gunpoint ordered her to leave with him. Her husband, who had been sleeping, entered the room and Defendant stated, "I'll kill you. I've killed already tonight and I'll kill you." A struggle between Defendant and the husband ensued which resulted in Defendant being pushed out the door. During their struggle the pistol held by Defendant pointed at the husband "clicked" but did not fire. Sometime later that morning Defendant entered Junior's Food Mart in Corning, Arkansas, and, after firing a shot into the ceiling, demanded a car and driver. He stated, "I've done killed once tonight. Wouldn't bother me to do it again." Somebody in the store pointed out his own car and told Defendant the keys were in it. Defendant drove away in that car and was arrested as he left the parking lot.

State v. Kenley, 693 S.W.2d 79, 80-81 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). After hearing this evidence, the jury found respondent guilty of capital murder. In a separate penalty phase of the trial, the jury found the existence of two statutory aggravating

circumstances: (1) that the murder was committed for purposes of receiving money, and (2) that by his act of murdering Felts, he knowingly created a great risk of death of more than one person in a public place. The jury assessed capital punishment as respondent's penalty. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. Id. At a separate trial, respondent was convicted of three counts of first degree robbery, two counts of kidnapping, two counts of first degree assault and one count of stealing, for which he received seven consecutive life sentences and a consecutive seven years term. That judgment was also upheld on direct appeal. **State v. Kenley**, 701 S.W.2d 185 (Mo.App., S.D. 1985).

Respondent then sought post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed 1-1-88). Respondent alleged, inter alia, that he received ineffective assistance of trial counsel at the penalty phase of his murder trial. After an evidentiary hearing,

the circuit court entered findings of fact and conclusions of law (A-137). The circuit court concluded that respondent did not receive ineffective assistance of trial counsel at the penalty phase. Respondent appealed the denial of relief to the Missouri Court of Appeals. After briefing by the parties, the appellate court affirmed the denial of post-conviction relief in an extensive opinion. **Kenley v. State**, 759 S.W.2d 340 (Mo.App., S.D. 1988) (A-145).

Respondent then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri (A-206). After amendment of the petition (A219) and responsive pleadings, the district court ordered the writ denied on July 12, 1988 (A-57). Respondent's motion to alter or amend the judgment was denied on November 22, 1988 (A-118). The district court granted a certificate of probable cause to appellant (A-120).

Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The appellate court found respondent received effective assistance of counsel at the guilt phase of the capital murder trial and at the noncapital murder trial. The court of appeals, however, found that respondent received ineffective assistance of trial counsel at the penalty phase and ordered the capital sentence vacated. **Kenley v. Armontrout**, 937 F.2d 1298, 1309-1310 (8th Cir. 1991) (A-1). Petitioner's petition for rehearing or rehearing en banc was denied on August 13, 1991 (A-204). The present petition for writ of certiorari ensues.

ARGUMENT

I.

AN ATTORNEY CANNOT BE FOUND TO HAVE RENDERED CONSTITUTIONALLY DEFICIENT ASSISTANCE TO A CRIMINAL DEFENDANT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION WHERE (1) COUNSEL MADE A REASONABLE INVESTIGATION OF RESPONDENT'S SOCIAL HISTORY AND MADE A REASONABLE DECISION TO INVESTIGATE NO FURTHER AND (2) INFORMATION ABOUT RESPONDENT'S SOCIAL HISTORY IS SO INSUBSTANTIAL THAT THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PENALTY PHASE WOULD HAVE BEEN DIFFERENT HAD THIS INFORMATION BEEN PRESENTED.

To justify a grant of a writ of certiorari, petitioner must show a conflict between the lower-court opinion and opinions from other circuits, state high courts, or this Court. Alternatively, petitioner must show an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 10.1(a), (c). Additionally, there are

situations in which this Court utilizes the discretionary writ of certiorari as a deterrent to misconduct by courts of appeals in the form of erroneous decisions. See, e.g., **Burden v. Zant**, ___ U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991) (presumption of correctness); **Sumner v. Mata**, 455 U.S. 591 (1982) (presumption of correctness); **Duckworth v. Serrano**, 454 U.S. 1 (1981) (exhaustion).

This Court has stated that the primary purpose of the writ of habeas corpus under 28 U.S.C. § 2254 is to serve as a deterrent to state-court misconduct in the resolution of federal constitutional challenges to custody. **Teague v. Lane**, 489 U.S. 288, 306 (1989). Likewise, one of the functions of this Court's discretionary writ, the writ of certiorari, should be to deter misconduct by the federal courts of appeals as manifested by their erroneous resolution of issues.

The present case represents an opportunity for this Court to correct the error of the

United States Court of Appeals for the Eighth Circuit in its resolution of respondent's claim that he received ineffective assistance of trial counsel at the penalty phase of his capital-murder trial. The claim considered by the court of appeals was extensively considered by the Missouri Court of Appeals during the appeal of the denial of state post-conviction relief. See **Kenley v. State**, 759 S.W.2d 340 (Mo.App., S.D. 1988) (A-145). The state appellate court extensively reviewed respondent's claim of ineffective assistance of trial counsel at the penalty phase. See id. at 344-48. The state court concluded that respondent did not receive ineffective assistance of counsel. Id. at 348.

Since respondent has had a full and fair hearing before the state tribunals, he failed to demonstrate any legitimate reason for issuance of a writ of habeas corpus. The federal appellate court failed to identify any misconduct by the state courts in considering respondent's allegations of ineffective assistance of

counsel. Mere disagreement by the federal court with the state court's resolution of a constitutional issue should be an insufficient basis upon which to grant a writ of habeas corpus. Because it did not find any misconduct by the state courts, the court of appeals failed to articulate how the rationale underlying the Great Writ, deterrence of state-court misconduct, is furthered by the granting of the writ of habeas corpus in the present case. See **Teague v. Lane**, supra. This omission by the appellate court, in and of itself, is sufficient to warrant this Court's issuance of a writ of certiorari.

In **Strickland v. Washington**, 466 U.S. 668, 689 (1984), this Court warned against reviewing counsel's conduct with the distorting effect of hindsight. To avoid hindsight, a reviewing court must indulge in a strong presumption that counsel's conduct was reasonable. See id. This is not merely sage advice to reviewing courts; rather, it is the law announced from this Court.

Did the court of appeals follow this standard? No. The United States Court of Appeals for the Eighth Circuit declined to enforce these **Strickland** principles with a claim that trial counsel is ineffective from the failure to investigate. See **Kenley v. Armontrout**, 937 F.2d 1298, 1304 (8th Cir. 1991). "[We] have held that counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." Id. at 1304. This is contrary to this Court's teaching in **Strickland** where this Court stated: "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466

U.S. at 691. The court of appeals, however, fails to presume that counsel makes a reasonable decision that makes particular investigations unnecessary. **Kenley v. Armontrout**, supra. There is no articulated rationale to support the court of appeals' ruling. There is no support for the court of appeals' action in the law of **Strickland** or its progeny.

Is deterrence by way of a writ of certiorari necessary? Yes. The court of appeals' failure to presume the reasonableness of counsel's pre-trial investigation and his decision not to investigate further has been the subject matter of pre- and post-**Strickland** litigation before the court of appeals. See **Kenley v. Armontrout**, 937 F.2d at 1304, citing **Eldridge v. Atkins**, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982); **Chambers v. Armontrout**, 907 F.2d 825 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369 (1990); **Thomas v. Lockhart**, 738 F.2d 304 (8th Cir. 1984); **Pickens v. Lockhart**, 714 F.2d 1455 (8th Cir. 1983). In

Chambers v. Armontrout, supra; **Lawrence v. Armontrout**, 900 F.2d 127, 129-130 (8th Cir. 1990); **Kenley v. Armontrout**, supra; and **Henderson v. Lockhart**, 926 F.2d 706, 711 (8th Cir. 1991), the reviewing court engaged in de novo review to determine whether trial counsel's actions were reasonable. Rather, the appropriate review would be to presume the reasonableness of trial counsel's actions and then examine the record to determine if the evidence overcomes the strong presumption of reasonableness. Given the erroneous pattern of review by the lower federal court, the grant of certiorari in this case is necessary.

As the lower court found, trial counsel received records from Mrs. Crownover, respondent's former social worker. After receiving these records, trial counsel requested and received a psychiatric examination of respondent at the Fulton State Hospital. After receiving the report from Dr. Parwatiker, an examining psychiatrist, trial counsel discussed the report

with a nonexamining physician. **Kenley v. Armontrout**, 937 F.2d at 1300, 1306. These actions by trial counsel confirm the presumption that he acted reasonably in his pre-trial investigation. These actions are hardly the foundation of an ineffective-assistance-of-counsel claim. See **Kenley v. State**, 759 S.W.2d at 345-46.

The court below also failed to engage in proper **Strickland** prejudice analysis. The court failed to identify what information it perceived to be mitigating and to entitle respondent to relief. **Kenley v. Armontrout**, 937 F.2d at 1309. "Reasonable counsel might have been somewhat selective in his evidence presentation, but would not have cast aside all the mitigating evidence in this case." Id. The evidence from which the court of appeals found **Strickland** prejudice remained a secret. See id.

Do the various findings of antisocial personality disorder entitle respondent to relief? Respondent's witness, Dr. Manion described this

as "unsocialized behavior disorder." **Kenley v. Armontrout**, 937 F.2d at 1305. Dr. Parwatikar described it as "antisocial personality disorder." Such information is not mitigating but, indeed, is actually aggravating. See **Penry v. Lynaugh**, 109 S.Ct. 2934, 2949 (1989) (describing defendant's mental retardation a two-edged sword); **Laws v. Armontrout**, 863 F.2d 1377, 1389 (8th Cir. 1988) (en banc), cert. denied, 490 U.S. 1040 (1989); **Otey v. Grammer**, 869 F.2d 1137 (8th Cir. 1989) (Heaney, Sr. J., dissenting from denial of petition for rehearing en banc) (ineffective to adduce evidence of sexual sociopathy).

The panel opinion also referred to respondent's electroencephalogram (EEG). **Kenley v. Armontrout**, 937 F.2d at 1305. Respondent's evidence described the 1975 EEG reading as relating to psychopathy--hardly an endearing characteristic. An EEG reading from two years later was normal. Dr. Parwatikar's EEG testing of respondent was also normal.

The panel also appears to find mitigation from respondent's military records--in particular, from a "suicide gesture." **Kenley v. Armontrout**, 937 F.2d at 1306. There is more to the story than what the court of appeals says. Respondent's own military records indicated that, medically speaking, respondent was capable of returning to military duty. There was no thought disorder or psychosis, and the suicidal thoughts were resolved. The EEG was normal. The doctors first discovered that respondent's "suicidal gesture" came on the first or second day of his basic training. Respondent decided that he would not cope with the Army; thus, the "suicidal gesture" occurred. No true suicidal thoughts or intent was involved. The military papers stated:

> Within his first week of contact with the Army, he has decided he cannot conform to the requirements of military life. He sustained a self-inflicted cut on his left wrist in a successful attempt to get out of training. It would probably be in the best interest of the service if he

were eliminated as expeditiously as possible.

The military doctors indicated that respondent was capable of distinguishing right from wrong and adhering to the right. He was responsible for his actions. Why did the court of appeals not discuss all of the information provided by respondent?

The court of appeals also appears to believe that evidence of respondent's intoxication would have been mitigating. **Kenley v. Armontrout**, 937 F.2d at 1307. There was no objective evidence to support this assertion. Of course, in respondent's affidavit before the district court, respondent made no allegation that he had been drinking before or during his crime spree. Indeed, in 1984, he told Dr. Parwatikar that he was not under the influence of any drugs or alcohol when the alleged crime occurred and that he was in complete control of himself.

Finally, the court of appeals put great weight upon affidavits from respondent's family members. An item that is not discussed by the court of appeals is the aggravating information that the family members possessed. As an example, petitioner notes that the affidavit of respondent's grandmother did not discuss respondent's assault upon the grandmother with a rock--an item of information that was presented to the district court in the presentence investigation that was ordered by the state circuit court. Presumably, the grandmother could describe the size of the rock, how many times respondent hit her with the rock, how much pain respondent produced and the emotions the grandmother felt about being hit by a rock. The grandmother could also describe respondent's threats to kill another boy when respondent was the age of fifteen, an item of information omitted by the grandmother from her affidavit, but included in the presentence investigation.

An item that received little attention from the court of appeals is the aggravating aspect of much of the alleged mitigating information. Petitioner has discussed respondent's assault upon his grandmother with a rock and his escape from military service by a "suicidal gesture." Further, the panel did not discuss the aggravating information that Crownover and Manion possessed such as respondent's assault upon a young girl on the school bus, his engagement in shoplifting, or his disruption of a ward at the Farmington State Hospital.

While respondent was being evaluated by Dr. Parwatikar at the Fulton State Hospital, an event occurred that the panel described as "one violent incident during Kenley's incarceration." **Kenley v. Armontrout**, 937 F.2d at 1306. That statement is correct, but as with most euphemisms, it is incomplete. Dr. Parwatikar reported that respondent stated:

> This guy constantly started bugging me, coming in front of me while I was watching television, rocking my chair

> when I told him not to do it, so I just went ahead and choked him.

Dr. Parwatikar stated that respondent went on to say that he was angry with the hospital staff because the staff restrained him rather than the person that "bugged" respondent.

Why is petitioner relating these anecdotes to this Court? Petitioner believes strongly that respondent failed to demonstrate a reasonable probability that but for the mental-health information, the outcome of the trial would have been different. See **Strickland v. Washington**, 466 U.S. at 694-695. Respondent committed a two-state crime spree on the evening of January 3 and 4, 1984. What the court of appeals found to be mitigating evidence is, when considered in context, not very mitigating and subject to rebuttal by the State in its portion of the penalty stage. Indeed, as the above examples demonstrate, much of the mitigating evidence is, in actuality, aggravating.

The court of appeals rationalized that the spree was so bad that additional aggravating evidence would have had little effect on the jury. **Kenley v. Armontrout**, 937 F.2d at 1309. That analysis is shallow. First, if the spree were that bad, then mitigating evidence would have had little effect upon sentencing. Second, the additional aggravating information would have effectively refuted any attempt to paint respondent as a wayward choirboy. Rather than have just a crime spree, the jury would have learned that violence was a way of life for which respondent felt no remorse. Under these circumstances, there is no reasonable probability that but for the lack of putative mitigating information, the outcome of the penalty phase would have been different.

Why should the writ of certiorari issue in this case? Petitioner believes that the writ should issue in order to show the United States Court of Appeals for the Eighth Circuit how to do proper **Strickland** prejudice analysis. Such

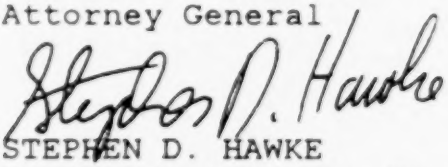
action by this Court will prevent the analysis of the panel opinion from adversely affecting other capital habeas litigation arising from Arkansas, Missouri and Nebraska.

CONCLUSION

WHEREFORE, for the reasons herein stated, petitioner prays the Court issue a writ of certiorari in this cause.

Respectively submitted,

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